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Supreme Court, U.S.
FILED

JUN 7 1999

No. 98-1170

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1999

LEONARD PORTUONDO, Superintendent,
Fishkill Correctional Facility,
Petitioner,

—v.—

RAY AGARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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June 7, 1999

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RELEVANT DOCKET ENTRIES

- 6/5/95 PETITION for a writ of habeas corpus (Queens County); (dg) [Entry date 06/07/95]
- 6/5/95 MEMORANDUM by Ray Agard in support of [2-1] petition (dg) [Entry date 06/07/95]
- 6/20/95 ORDER TO SHOW CAUSE: (1) Petitioner is granted leave to proceed in forma pauperis; (2) Attorney General of the State of New York or the District Attorney for Queens County show cause by filing a return, why a writ of habeas corpus should not be issued; (3) within 45 days of the date of this order, respondents shall serve a return. Petitioner with 45 days of receipt of the return shall file his reply. (signed by Judge Reena Raggi 6/13/95) c/m (copies sent by Federal Express to Dennis Vacco, Richard Brown and Petitioner). (fp)
- 10/10/95 Nicoletta J. Caferri's AFFIDAVIT/MEMO OF LAW in opposition to petition for a writ of habeas corpus. (lg) [Entry date 10/18/95]
- 11/13/95 REPLY MEMORANDUM OF LAW by Ray Agard in support of Petition for a Writ of Habeas Corpus. (fp) [Entry date 11/15/95]
- 3/15/96 Calendar entry: Before Judge Raggi on 3/15/96. Argument held on habeas petition; Petition denied; Certificate of probable cause to appeal granted. (fp) [Entry date 03/20/96]
- 3/20/96 ORDER, denying [2-1] petition for a writ of habeas corpus and a certificate of probable cause

to appeal is Granted. (Signed by Judge Reena Raggi 3/15/96) c/m (fp)

3/21/96 JUDGMENT for Leonard Portuondo against Ray Agard; The petition for a writ of habeas corpus is denied; and, that a certificate of probable cause to appeal is granted. (signed by Robert C. Heinemann on 3/21/96) c/m (appeals package sent) (fp)

5/28/96 Appellant Ray Agard brief and (joint) appendix received. Problem: need record on appeal. (pr27)

5/28/96 Appellant Ray Agard brief and joint appendix with proof of service filed. (Shelf 59 room 1804). Satisfy appellant's brief due. (pr27)

5/30/96 Record on appeal filed. (Original record of the district court) (State Court Proceedings Incorporated.) (pr27)

6/26/96 Appellee Leonard A. Portuondo brief filed with proof of service. (Shelf 59 room 1804) (pr27)

7/1/96 Appellant Ray Agard reply brief filed with proof of serve. (Shelf 59, room 1804) (pr27)

10/24/96 Case heard before OAKES, VAN GRAAFEILAND, WINTER, C.JJ., (TAPE: 59) (ca91)

7/3/97 Judgment of the district court is REVERSED & REMANDED by published signed opinion filed. (JLO) [96-2281] (pr27)

7/3/97 Judge RKW concurring in a separate opinion filed. (pr27)

7/3/97 Judge EVG DISSENTING in a separate opinion filed. (pr27)

7/3/97 Judgment MANDATE ISSUED. (pr27)

7/10/97 MANDATE OF USCA (certified copy) Re: [27-1] appeal. Ordered that the judgment of the District Court is reversed and the case is remanded to the said District Court for further proceedings in accordance with the opinion of this Court. Issued as Mandate 7/3/97. Acknowledgment returned to USCA. Judge notified. USCA 96-2281. (mm)

7/11/97 ORDER, the court grant's Ray Agard's petition for a writ of habeas corpus and orders him released from state custody upon the completion of his sentence for weapons possession unless the State of New York affords him a new trial on the charge of sodomy in the first degree within sixty days of the mandate issue by the Court of Appeals. (signed by Judge Reena Raggi 7/9/97) c/m (fp)

7/15/97 JUDGMENT for Ray Agard against Leonard Portuondo. The Petition for a Writ of Habeas

Corpus is granted; and, that petitioner be released from state custody upon the completion of his sentence for weapons possession unless the State of New York affords him a new trial on the charge of sodomy in the first degree within 60 days of the mandate issued by the Court of Appeals. (signed by Judge Reena Raggi/James Giokas 7/14/97) c/m (copy sent to Mag. Azrack) (fp) [Edit date 7/16/97]

7/17/97 Appellee Leonard A. Portuondo petition for rehearing received. Problem: need additional copies. (pr27)

7/18/97 Appellee Leonard A. Portuondo Petition for rehearing, petition for rehearing in banc [1014632-2] with proof of service filed. (pr27)

7/18/97 MANDATE OF USCA (certified copy) Re: it is ordered that the judgment of the district court is reversed and the case is remanded to the district court for further proceedings in accordance with the opinion of this court. Issued as Mandate 7/3/97. Acknowledgment returned to USCA. Judge notified. USCA #96-2281. (mm) [Entry date 07/21/97]

10/23/98 Petition Opinion FILED DENYING petition for REHEARING [1014632-1] by Appellee Leonard A. Portuondo, endorsed on motion dated 7/18/97, DENYING petition for rehearing in banc [1014632-2] by Appellee Leonard A. Portuondo, endorsed on motion dated 7/18/97. (RKW) (pr24)

10/23/98 Judge Van Graafeiland DISSENTING in a separate opinion filed. (pr24)

2/1/99 Notice of filing petition for writ of certiorari for Appellant Ray Agard dated January 25, 1999 filed. Supreme Court #98-1170. (pr24)

[742] MR. JOHNSON: Good morning, ladies and gentlemen. It is now my opportunity to make a closing argument to you on Mr. Agard's behalf, or summation.

In my summation, what I will do is I will review the evidence in the case and ask you to draw certain inferences and conclusions from the evidence. Before I start, I just want to say to you that in my review of the evidence in the case, it will always be your recollection as to what the evidence was that controls.

You are the judges of the facts in the case, and if there is anything I say that came out of their testimony or any comment I make concerning the evidence that doesn't agree with your recollection, it is your recollection that counts.

I would also ask you, though, if you are not sure, we have had a reporter here throughout the whole trial taking down everything that was said. You have the right to ask for readbacks of anything, any of the testimony in the case. You have [743] the right to request any of the exhibits that were entered in the case. If you are not sure or don't remember something, please, just ask for a readback or ask to see the exhibit.

The second thing I am going to ask you, I am going to make arguments based on the evidence. If you find my arguments to be unreasonable and don't make sense, please reject them, but if the arguments I make based on the evidence in the case do make sense to you, do seem reasonable to you, I ask that you adopt them and bring them with you into the deliberations room.

The first and foremost things that the evidence in this case showed is that Nessa Winder was lying. You need look no further than the medical records in the case to see that. You all heard Miss Winder's story concerning the incident, the long drawn out protracted alleged rape and sodomy, but the medical records don't support that.

Their doctor told you, Dr. Karimi, as well as well Dr. Gilbert, the doctor we presented, they all agreed that the pelvic examination that was done showed absolutely no signs of trauma.

[744] Now, I guess it may be possible that there could have been vaginal intercourse without the woman's consent three times without their being trauma. It's possible. You can use your own common sense. It doesn't seem likely. It doesn't seem reasonable, but the forcible anal intercourse that Nessa Winder described would have left signs.

You heard her describe it. You heard her describe the whole incident. You heard her describe how she was yelling for the landlord, to try to make noise so the landlord would hear. You heard her telling her story about faking the epileptic seizure.

If you believe her story, you would have to believe that there was struggle. If you believe her story.

She also told you, she told you how sore and how much it hurt when this anal intercourse, when she says there was this anal intercourse. Then it happened a second time and it was even longer the second time, and it was very sore and it hurt a lot.

When something like that happens, there would be evidence of it. It is said even the [745] smallest sea gull leaves footprints in the sand if they land on the beach. There are no footprints in the sand in this case.

Now, you may remember that after I cross-examined Miss Winder and I went into the fact when you say Mr. Agard twice, you know, forced you to have anal intercourse and you say it was very sore and you say it hurt a lot, she said yes, yes, yes, but then on redirect she said, well, I didn't struggle, and that was an explanation for why, a supposed explanation for why there were no signs of trauma.

But I ask you to think about it, think it through. Isn't there a difference between -- even if you believe she didn't struggle, which I believe if you listen to her whole testimony concerning the whole incident, it is not consistent with her testimony to believe she didn't struggle, but even if you believe she didn't struggle, there is a difference between not struggling and being relaxed. How many of us just tense up just at the thought of forcible anal entry.

I mean it is not a pleasant thing, but you have to look at that and you have to think about [746] that in determining whether or not there would have been evidence of trauma in the medical records. There would have been. There would have had to have been.

The reason the medical records show Miss Winder was lying is because medical records can't be changed. Medical records are what the medical records are. It's not something she can explain away by saying something happened differently than it did. It is one of the pieces of evidence in the case that cannot be changed by her testimony, and that is why it is one of

the pieces of evidence, the strongest piece of evidence in the case that shows you that she is lying.

Now, I believe Dr. Karimi stated that it would be possible to have anal intercourse without signs of trauma. Now, I ask you to use your own common sense and reason and apply it to the facts as Miss Winder testified, with the sort of situation and facts that she explained.

Is that the sort of situation which there could be anal intercourse without a sign of trauma? I believe not. I believe if you take a reasonable view of how she described this incident, [747] there is no way that she was telling the truth. There would be signs of trauma to the anus. Probably should have been signs of trauma to the vagina as well.

Dr. Karimi said, well, it's possible if less than moderate force was used for there to be no signs of trauma. Once again I ask you to look back on her testimony concerning the whole incident. She claims that she got the black eye because Mr. Agard beat her during this alleged rape and sodomy. Would it make sense that somehow Mr. Agard was rough and physical with his fists as she claims and somehow was gentle when it came to the anal intercourse?

Once again, remember the difference between not struggling and relaxing. There is no way anyone could have relaxed in that situation if it was as she described it, but it wasn't and that is what the medical records shows you.

The medical records, because they can't be changed and can't be explained away, also show other lies of Miss Winder. She claims Mr. Agard hit her in the lip, that her lip was bleeding, that her lip was busted up.

[748] Go through the medical records carefully. Look for anywhere that signs of trauma is noted and you will find only the left eye. You will find nothing concerning the lips.

Look at the People's own evidence, the pictures, 1, 2, and 3, that they like so much shown to show the black and blue eye which is not being contested here; that she had a black and blue eye, but look at her lips. She said her lips was all busted up. There is nothing wrong with her lip. It's not swollen, but if you look carefully, you don't see any crack or anywhere that it was bleeding or could have been cut.

Once again she didn't anticipate the medical records. The medical records can't be changed. The medical records are what shows she was lying.

As to the eye injury itself, once again look at the pictures. No one is contesting that. She definitely had a black and blue eye, but she claims that this injury was caused by Mr. Agard punching her three times.

Is that reasonable? Is that consistent with what is in the picture?

She definitely has a black and blue eye but [749] that is the only injury on her face. Can someone pick out one, two, three spots and hit in the exact same spot? That's not reasonable. That doesn't make sense.

You look at the injury and it is reasonable and it makes sense to believe that it was the product of being struck once. Look at the pictures, please.

Also in the medical records on one of the reports it does note as far as the extremities that -- if I may have a moment -- "Extremities. Multiple bruising over upper and lower extremities. No point tenderness or evidence of fracture," but still further examination of Miss Winder indicates extremities not tender.

Dr. Gilbert explained to you two possible reasons how there could be bruises noted without tenderness. It could be someone who bruises very easily, and I believe he said it was capillaries. I am not going to pretend to remember exactly what the term was, but that a person could bruise without there being any real force used or they could be old bruises.

Are either of those consistent with the [750] story Miss Winder told of the long involved forcible rape and sodomy? No, they are not. These bruises are either old bruises or they were not caused by any real force.

As to her eye and the spots, once again she can claim there were spots. There is nothing we can do to stop her from testifying as to what she wanted to testify to, but look at the medical records. Under "Neurological," "Visual field intact."

Also look at the medical records on the page before that. You see "City Hospital Center at Elmhurst, Doctors instructions to patients." "Return if left eye is still blurry in twenty-four hours."

So, was there ever any evidence, any testimony of her returning? Were there any medical records of any subsequent trips to the hospital, to a doctor? Was there any testimony of anything subsequent?

She didn't go back because her eye wasn't blurry. The spots are something she has added to her story to make it sound good. The visual fields were intact. She didn't return for any treatment. [751] She has no continuing problem with her eye.

She got a black eye and not to belittle that but that is what it was and that is all it was.

I would also like you to think it through and consider the reasonableness of the two different stories. You heard Miss Winder testify and you heard Mr. Agard testify. Is the Doctor Jekyll and Mr. Hyde aspect of Breda Keegan and Nessa Winder's story reasonable? They told you about the first weekend, meeting Mr. Agard, that he was a perfect gentleman. Miss Winder felt comfortable with him, went back to his apartment, slept with him both literally and figuratively. They got along just fine.

That very first evening Mr. Agard proved himself a gentleman when he gave Miss Winder's friend his phone number so that she could call and let Miss Winder know she had gotten home safely. Are those the actions of a man who was going to turn around the next week and do all these outrageous things? People with guns and force himself upon a woman? It is not consistent. It doesn't make sense.

It also doesn't make sense if you look at [752] Nessa Winder and Breda Keegan's story together. Somehow they would have you believe that Mr. Agard went off and lost control and he took out the gun and he threatened Breda Keegan, and then she leaves and he goes to sleep, wakes up approximately three hours later and goes off again. I mean that is really Doctor Jekyll and Mr. Hyde. It doesn't make sense.

If he had in fact threatened Miss Keegan, which the evidence shows he did not because of her actions -- I'll get to that in a minute -- but if he had in fact threatened her, wouldn't there have been a rape that evening? Does someone go off into this mad rage as he would have, as Miss Keegan claims, and then goes to sleep and get up and go back into it? It's not reasonable. It doesn't make sense. It is not consistent.

Now, we all talked in voir dire about the fact that because a woman has slept with a man doesn't mean she does not have the right to say no to him at any time and place, and no one has ever contested that.

I am going to ask you to look at the fact that they did have consensual sex, even admitted [753] by Miss Winder, the week before, not for the purpose of saying that she didn't have the right to say no anymore but to determine in your mind whether or not she did say no the next weekend.

I ask you to think of this. If she had said no, in the position Mr. Agard was in, would there have been any need to, you know, suddenly force himself upon the woman to go into a violent rage, take out a gun and threaten her and over a period of three or four hours rape her and sodomize her? Even if she had said no that morning -- which I don't think the evidence supports -- he would have no reason to believe that in time Miss Winder would not want to have consensual sex with him again. They met the weekend before. She came back. There was a mutual sexual attraction. They had sex. They both seemed to enjoy it.

She came back to his apartment the next Saturday night. If she had said no that morning, is there any reason Mr. Agard wouldn't have had to believe that she wouldn't in time decide

that she wanted to have sex with him again? There would have been no reason for him to turn into Mr. Hyde.

[754] Wasn't Mr. Agard's testimony concerning what happened a more reasonable and natural extension of the relationship that started the weekend before? Isn't it consistent? Isn't it the more natural extension of a relationship that began? They have a mutual sexual attraction. They have sex. They like each other. They are becoming friends.

She comes back to his apartment the next weekend, falls asleep. He goes to sleep with her. They wake up in the morning and make love and fall back to sleep again.

Isn't that a more natural extension of the relationship that had begun the weekend before? Rather than the Dr. Jekyll-Mr. Hyde aspect of the complaining witness'-story.

They fall back to sleep. They wake up again sometime around one o'clock. This is when Miss Winder realizes, gee, it's one o'clock the next day. I have now been out late. I have been out all night. My boyfriend from London or England or wherever she says he was from is in town. How am I going to explain this?

Again after that there is the incident Mr. [755] Agard described. She was very upset. She didn't know how she was going to explain this. She wanted to get back. What is she going to say to her boyfriend.

He puts his arms on her to calm her down. She turns, slaps him, comes down and her fingernail catches him inside the lip. Okay. Perhaps a man, you know, should never strike a woman, but reactively Mr. Agard did, but it wasn't three

punches in the face. The pictures don't bear that out. The medical records don't bear that out.

You can see from the pictures that it was one strike (demonstrating).

Then look at Miss Winder's position. She not only has to explain the way being out all night, not coming late but definitely having been out all night. I mean this is the afternoon of the next day, and now she has redness or a black and blue eye or is going to have a black and blue eye. The black and blue takes time to come out. How is she going to explain that away? She doesn't know.

- She gets in the cab. She can't go back to see her boyfriend right away because she doesn't [756] know how she is going to explain this. So she gets out and she calls her best friend Breda Keegan to come out to Queens. They talk it over and they go to the police and they cry rape. Nessa Winder cries rape.

Nessa Winder also told you that she doesn't remember anything after leaving The Cave that night, and she was too intoxicated to remember. Yet she was able to describe what happened to Detective Giardina in the hospital.

Now, I know Detective Giardina went to some efforts to explain a way, well, that maybe wasn't Miss Winder who was telling him these things. Maybe it was Miss Keegan. They both were there, but when I asked the detective isn't it a fact you drew up two reports -- "Yes." One of the interview with Miss Winder and one of the interview with Miss Keegan, separate reports? "Yes."

Isn't it a fact you put in the report of your interview with Miss Winder that Miss Winder told you they stayed in The Cave until about three o'clock? That Miss Winder explained that they left to try to get into another bar? That Miss Winder explained that they did not gain admittance [757] and that they went to a local bar? And, most telling, the detective had to admit that he put in his report Miss Winder said she was intoxicated but she remembers getting into the car with Ray, Freddy, Dee and Breda and going back to Ray's apartment.

Could Breda Keegan have possibly told the detective what Nessa Winder remembers? No. And that was the language the detective used in the report. He admitted to that. Nessa Winder was telling the detective what happened after they left The Cave that night.

She did not want to tell you that she remembered what happened because she did not want to have to own up to the fact that she had insisted upon going there. She wanted to go back to Ray's apartment that night. That she had in fact insisted upon it. That her friend Breda was reluctant but it had been her idea.

She wanted to go back and she wanted to spend the night with Mr. Agard. She did not want to have to own up to that. She did not want to have to admit that to you people because it did not fit into her story. So, when it came to her testimony [758] in court here, she doesn't remember any of it.

Well, that is not true and the detective's testimony shows that is not true.

Miss Winder told a rather effective story. I mean you sat here and you listened and certain parts you couldn't help but go (gesturing), but what she told you was a story. It was a script.

Now, she admits she made notes of the indictment. She explained, well, just in my diary, but this was not a diary that someone writes and keeps under their bed and never looks at it again until they write the next day's entries. This sort of occurrence that she described, if it had been true, is the kind of thing women spend their lives trying to forget. Yet she brings these notes with her to the Grand Jury.

She told us she had them at the Grand Jury. I asked her, well, when was the last time you reviewed them. She said the Saturday night before she testified.

Is it really the sort of thing that someone needs to review their notes for or is it the sort of thing a person would like to but can't forget? If it happened she wouldn't have had notes. She [759] wouldn't have needed notes. She wouldn't have used notes. Her story was scripted.

I believe I told you in the opening statement that a good or an effective lie often mixes in elements of truth, and Miss Winder's script was effective. She took all the sex that they had the first weekend, added it to all the sex the second weekend, threw in the gun that she had found in Mr. Agard's closet, claims he forced her and that was the bottom line basis of her story.

That they had sex, some sex, Mr. Agard never denied, but that morning he told you they had had only vaginal sex. She described the long, drawn out incident with the anal and oral -- oral, anal, oral -- well, you heard the testimony. You can have

it read back if you need the order of things. Yet the Vitullo Kit showed positive for spermatozoa only on the vaginal slides. Consistent with what Mr. Agard told you happened. That they woke up in the morning as, you know, lovers or people with sexual attraction will often do, make love in the morning, and it's probably not that unusual that they also then rolled over and go back to sleep.

[760] The results of the Vitullo Kit are consistent with what Mr. Agard told you happened. They are not consistent with what Miss Winder told you happened. There was absolutely no signs of any spermatozoa in the anus or the mouth.

I ask you whether it is feasible that there would have been an absolute none. I don't believe that's reasonable.

- There was one other thing in Miss Winder's story that she told you that I must comment on. When she told you about how Mr. Agard's penis tasted after allegedly he had entered her anus, I think everyone in the courtroom kind of went (gesturing) and if that had actually happened, we would very well be justified in going (gesturing), but it never happened.

The medical records show you there was never any anal entry. The medical records show you she is lying about that.

Once the medical records show you that she's lying about that, the fact that she told you that shows you what kind of liar she is; that she thought this all through. Maybe she drew from experience. Maybe she just thought it through what [761] it would be like if it had happened the way I am saying it happened.

The medical records show you. Look at them. They show you she is lying about the anal intercourse or there would have been signs of trauma. There would have been signs of trauma in the vagina even with three times forcible intercourse, but certainly in the anus, and what she told you about that shows you what kind of liar she was.

There is one other thing I would ask you to look at in the medical records. This special report form for sexual assault cases. Dr. Karimi told you that he was called in -- he wasn't the emergency room physician. He was called in especially because there was an allegation of a sexual assault; that he filled out this form, and doesn't it make sense that it filling out this form, he's going to be looking for all the signs of things that would support the claim? Not only is the pelvic examination "no evidence of trauma," then the symbol for negative finding concerning everything else including the rectal-vaginal, but the physical examination which has in parenthesis "include all details of trauma" and then [762] there is nothing else noted but the injury to the eye.

If there had been a busted up lip or if there had been bruises that were consistent with sexual assault, wouldn't this doctor who is called in to do this type of examination have noted that? Wouldn't the doctor have noted that on the form, especially where it says in parenthesis "include all details of trauma?"

I believe he did. It's up to you to decide whether that is reasonable and consistent.

Breda Keegas was also lying and it's not so much through the medical records you can see that but her own actions belie her words. What she told you she did is not

consistent with -- it contradicts what she told you happened. She described Mr. Agard threatening her with the gun and grabbing her around the neck during this period when -- excuse me -- Mr. Kiah and Freddy went to get the beer, but what happens when Mr. Kiah and Freddy come back? Does she immediately go, "Oh, good, other people are here, let me get out of here?" No. She didn't immediately leave.

First I believe she told you that she then [763] took Mr. Agard into a separate room. Would a woman now want to go and be alone in a separate room with someone who had done what she said he did? Is that consistent? Is that reasonable? I think not.

Then she said, well, I wasn't sure whether I wanted to leave at that point. Wouldn't you want to get out of there?

I asked her when you were going to get a ride home with Mr. Kiah, did you ask him to help you take Nessa out? "No." Would any friend, no less than a good friend as they were, eight years friends, they were schoolmates in Ireland and they are living together over here in the United States, would any friend leave another friend in that situation? If in fact Mr. Agard had in fact threatened her with a gun and grabbed her around the neck, wouldn't you do anything you could to get your friend out of there? Does it make sense? Is it reasonable? No.

What does she do when Mr. Kiah took her home? First Mr. Kiah told you she never told him that Mr. Agard had threatened her in any way or that Mr. Agard had taken out a gun. She gets home, she goes to sleep. Maybe she was tired, fine, but would you just go to sleep if that had happened to you

and [764] your friend was still in that apartment? Wouldn't you do something? Wouldn't you go to the police?

Now, think if it's reasonable and consistent as Mr. Agard explained it to you. Breda and Nessa were out together. Nessa wanted to go back to Queens to Mr. Agard's apartment. Breda was pretty luke warm on the idea, but Nessa convinced her and what happens when they get all the way back to Queens? Nessa falls asleep.

There is Breda left out there in Queens not crazy about going there in the first place and now her friend is not even awake to be hanging out with her. Is it reasonable that someone in that position is going to want to leave, and if they had been out drinking is going to a little loud about it? "I can't believe my friend dragged me out here. Here I am out in Queens. I want to be home. It's late. She's asleep."

Is it reasonable that someone may raise their voice a little, especially if they have been drinking, and make some noise? Is it reasonable that someone who lived in an apartment such as Mr. Agard as was described to you, just rooms and a common area, would then say to his friend, you know, [765] "Adolph" -- or "Dee, can you take her home?" and he does that. Is that reasonable and consistent? Yes.

Are her allegations of what Mr. Agard did consistent with just leaving her friend there and not going to the police? No.

You also heard from Mr. Kiah. Mr. Kiah, I mean he was straight forward. He didn't pretend to know what he didn't know. The District Attorney asked him you were there the next

day, you don't what happened, and he said no, I don't. I wasn't there.

He's kind of a quiet guy but I mean it's up to you to judge the credibility of the witnesses and determine if you thought he was a straight forward person just telling what had happened, and you listened to him, you heard him. It will be up to you to determine, but he did tell you that that evening Nessa Winder wasn't asleep in the car when they left The Cave, that she was in fact on Mr. Agard's lap because they were all cramped into his car and that they were being affectionate.

Is that consistent with the relationship that had developed the week before? Yes.

[766] He also told you that she came into the bar with him, that local bar, and they had drinks, and that they were all talking. She wasn't asleep. She wasn't blacked out and that when she came in the car in fact she was intent on coming back to Mr. Agard's apartment.

He also told you contrary to what Breda Keegan would have you believe that she never told him that Mr. Agard threatened her with a gun, and that is about all that he told us because that's about all he was there for. He didn't try to tell you things he didn't know. He didn't try to remember things he couldn't remember.

It's up for you to judge his credibility.

I talked to you in my opening statement about how certain evidence can be viewed differently depending on whether you start with a presumption of guilt or whether you afford Mr. Agard the presumption of innocence that he is entitled to. I

think a very interesting and very important piece of evidence in this case is the tape recorded phone message. You heard it and you saw the transcript, I believe it's in evidence. You can ask for it to be played back to you, but if you don't [767] start with a presumption of guilt, if you don't say to yourself, well, Nessa Winder said he did it and so this must be an admission, some sort of confession apologizing for that terrible thing he did, or you can afford Mr. Agard the presumption of innocence and scratch the surface and say, well, wait a minute, what would a call and apologize for. Does a person call and apologize for an extended rape, forcible rape-sodomy over a three to four hour period? Is that something a person can possibly apologize for or could a man apologize to a woman because he struck her whether it was reactively or not, and can a man feel bad for having struck a woman upon reflection the next day and call and apologize for it.

Listen to some of the words. He says it was all my fault. Now, in order to say that, there would have had to have been a question of whose fault it was. Is there any question of fault in a long extended rape-sodomy? No. There is no question of fault with threat with a gun and force is used. There is no question of fault there. No one would say that was my fault. There is no question about it.

[768] There could be a question of fault where a woman scratched at a man and he hit her and upon reflection him saying "Yes, that was my fault that I did that."

Do you apologize for a long extended rape-sodomy? No. Do you say it was your fault? No.

Do you apologize for striking a woman? Yes. Do you say that was your fault, whatever the circumstances? Yes. That is reasonable.

There were also some things the prosecution brought out when they cross-examined Mr. Agard, that he had once driven without a license, that he had left his felony conviction off his job applications. If you had just met someone at a party or wherever and they told you I once drove without a license or I once left -- I have a felony conviction and I left it off a couple of my job applications when I was trying to get a job, would you go "oh my goodness, what a horrendous person?" No. If you don't start with a presumption of guilt here, you won't be depressed with such things in judging the facts of this case. Those things have nothing with the facts of this case unless you are presuming Mr. Agard guilty to [769] begin with, those things should not impress you at all.

There a number of gun charges in the case, possession of weapon charges. I ask you, please listen carefully to the Judge's instructions on the gun charges. There are counts there charging use or possession of the weapon with intent to use against someone else. That is not true.

There are counts there alleging use during the commission of a crime. That is not true either. That gun sat in Mr. Agard's closet. Nessa Winder found it and played with it, was fascinated by it the first weekend, and if not for her lies about what happened the subsequent weekend, that gun would probably still just be sitting unloaded in Mr. Agard's closet. There was never any use of that weapon against anyone else. There was never any intent to use it against anyone else. There was never any possession of it during the commission of a crime.

Listen carefully to the elements of all the charges related to the gun, and be careful. Yes, he had the gun but because he had the gun, don't convict him of something that he is not guilty of. [770] Listen to the elements. It was simple possession. It was in his closet. There were no bullets in the gun.

There are also assault charges in the case, and no matter how you feel about it, that a man should never strike a woman -- and I think the phone message shows you that Mr. Agard would agree with you for feeling that a man should never strike a woman -- but the fact that it may be wrong doesn't make it criminal.

Listen to the Judge's instructions with regard to any of the assault charges. It is required that the People prove beyond a reasonable doubt that Mr. Agard had an intent to injure Nessa Winder. If he reacted reactively, if that's not redundant, if he just reacted because he had a fingernail dug in his lip, he never formed an intention to injure anyone.

It may be regrettable but it wasn't criminal.

I believe there is also unlawful imprisonment charges. Those I believe I have covered with my discussion of whether or not it is reasonable to believe what Breda Keegan told you and what Nessa Winder told you. I am not going to go through that [771] all again.

Listen carefully to the elements and you will find that those elements have not been proved beyond a reasonable doubt either.

Now, it is part of my job in my closing argument here to try and anticipate as best I can some of the arguments that the

prosecution will be making to you. I of course -- if I suggest things and the prosecution doesn't argue them, then I am simply wrong in my anticipation. I'm sure I won't anticipate everything but there are a few things I would like to comment on with you.

The prosecution may very well talk about the long drawn out incident, but, remember, the question is not whether a forcible rape-sodomy is a terrible thing. No one here will deny that. The question is whether or not it happened here.

Don't convict a man because of the nature of the charges against him when the quality of the evidence against him simply is not there. Don't be affected by the recitation of Nessa Winder's story again when the evidence shows that they have not proved that is true.

Once again, if it is suggested to you that [772] somehow the lack of trauma can be explained away because she didn't struggle because she was scared, was her testimony as a whole concerning this incident consistent with her not struggling, or was her testimony consistent with her trying to tell you she did struggle and once again, the difference between not struggling and being able to relax.

I don't see how anyhow can possibly find that a woman would be able to relax her anus in that situation. It is just not reasonable, it is not believable.

That Nessa Winder I believe told you -- well, she continued her relationship with Mr. Agard because she wanted to be just friends with him. Nessa Winder didn't even know Mr. Agard's last name at the time she went to the police. Is that consistent with someone who is, you know, looking to develop a friendly relationship or is that consistent with someone who

first had a mutual sexual attraction and then finds, well, maybe a friendship is going to develop out of that.

Miss Keegan, I believe, tried to explain away her actions of going home and going to sleep, that she didn't feel Nessa was in any danger. Is that [773] consistent with what she told you happened while she was there? Is it possible that you could be there with a good friend of yours and the person that you leave her with had threatened you with a gun and grabbed you around the neck and been out of control? Is it possible you could leave a friend behind and say, "Well, she's not in any danger"? Is that reasonable? Is it consistent? No.

Now, this will be my last opportunity to speak with you on Mr. Agard's behalf. I will not get to respond to what the prosecution argues to you in their summation. I have not gotten to take notes on what -- I will not get to take any notes on what the prosecution argues in their summation. I will not get to respond.

They will have the last word but I ask you, please, you have been here through the whole trial from day one. I would hope by now that you have some understanding of what the defense's contentions are in this case, and when you listen to what the prosecution argues to you, since I cannot, I am going to have to ask you in your minds to think how would the defense respond to that.

Rape is all too easy of a charge for a woman [774] to allege.

MS. MULLANEY: Objection.

THE COURT: Sustained.

MR. JOHNSON: Under the circumstances as described in this case where it is only the two people alone together, it becomes all too easy for a person to lie.

Mr. Agard has been caught in the trap of Miss Winder's lies. Evaluate the evidence. Don't just be accepting. Scrutinize it. Make an actual determination of whether this case has been proved to you beyond a reasonable doubt. Don't just accept. Set Mr. Agard free from that trap. Do not convict a man simply because of the nature of the charges against him when the prosecution has not proven that those charges are true. Certainly has not proven them beyond a reasonable doubt which is the standard in an American court of law as the Judge will explain to you.

When you do that, if you actually look into the evidence, if this case was not over for you after Nessa Winder testified, if you stuck around to listen to everything else, you will find the prosecution has not proven their case to you [775] beyond a reasonable doubt and I would ask you to return a verdict of not guilty on all the charges.

Thank you very much.

THE COURT: Thank you, Mr. Johnson.
Ms. Mullaney.

MS. MULLANEY: May it please the Court, Madam Forelady and ladies and gentlemen of the jury, in a short while after I have finished speaking with you, the Judge is going to charge you on the law, and at that point you are going to begin your deliberations in this case. You are going to begin your real function in this case.

When you come back with the verdict in this case, you are going to be telling us what you believe, each of you believes to be the truth in this case. It is your duty to take all of the evidence in this case, all of the testimony in this case and put it all together and to decide this case in accordance with your conscience.

I submit to you that if you use your common sense, your life experience and you evaluate all of the testimony that you heard in this courtroom, there is only one verdict. It's very easy. It's very simple. The defendant is guilty of all of [776] these crimes beyond a reasonable doubt. Not beyond all doubt, not beyond a shadow of a doubt but beyond a reasonable doubt, the standard that the People are required to prove.

Ladies and gentlemen, I ask you to take all of the testimony in this case. I ask you to rely on the testimony of Nessa, of Breda, to use all of the evidence in this case, all of the evidence which supports and corroborates what they told you here.

I ask you to take into this jury room all of these photographs. I ask you to take into that jury room this tape and play it again. I ask you to take into the jury room this Vitullo Kit. I ask you to take into the jury room these medical records.

I ask you to take this gun into the jury room with you, and I ask you to use all of that evidence in evaluating this case. Most of all I ask you to take this photograph into the jury room, and I ask you to compare this photograph, the defendant in this case, Ray Agard, with these photographs of this victim because, you know what Mr. Johnson wants you to believe here, ladies and gentlemen? [777] He wants you to believe there is a victim here.

Mr. JOHNSON: Objection, your Honor.

MS. MULLANEY: He wants you to believe that that man is the victim here.

MR. JOHNSON: Objection.

THE COURT: Overruled.

MS. MULLANEY: The victim of all the lies of Nessa Winder and Breda Keegan.

When you take a look at the photographs here, you take a look, ladies and gentlemen, at the evidence and you tell me who is the victim in this case.

He has tried to raise some doubt in your minds, any doubt. No reasonable doubt. He wants you to speculate. He is telling you that those complaining witnesses were lying.

What evidence do you have before you in this court that those complaining witnesses lied to you? What he wants you to do, instead of relying on the testimony of Nessa Winder and Breda Keegan, is to put all of that aside. Forget her demeanor. Forget the way they testified. Forget all of that emotion, all that feeling, all those tears, all of that pain.

[778] MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: (Continuing) That you saw on that witness stand and instead, ladies and gentlemen, Mr. Johnson tells you forget about it. Just forget about it.

MR. JOHNSON: Objection, your Honor. This is not a view of the evidence. It is comment on me.

THE COURT: Overruled. Fair comment under the circumstances.

Go on.

MS. MULLANEY: (Continuing) Forget about all of the tears, all of that pain and rely on the testimony of this man. Rely on his word, rely on his version of the story, the accomplished liar, the one with the felony conviction.

You didn't hear anything like that about the complainants, did you? No history of lying in their backgrounds. No felony conviction in their backgrounds, but Mr. Johnson says disregard everything they say. Liar, liar, liar. Rely on my client, his word is as good as gold here.

Ladies and gentlemen, we discussed life styles and we discussed behavior on voir dire and [779] in the opening in this case. We went through an awful lot about that and I asked each of you, I believe, how you felt about a woman who met a man on the first night and went home and had sex with him. I asked you if you could judge credibility rather than judging whether or not you liked someone or whether or not you agreed with their lifestyle, and I am not here telling you that I agree with Nessa Winder's lifestyle or Breda Keegan's lifestyle, or that I approve of going out and meeting a man and going home and having sex with him, and I am not asking any of you to do that.

I am not telling you that she was raised in a convent or she lives the life of a nun. I am not asking you to agree with her actions, but just because they put themselves in a bad situation, just because they put themselves in a dangerous situation

doesn't mean that he is excused or he is not guilty, and if any of you, any of you end your consideration of this case with "I don't like them," or "they shouldn't have been there," you are not doing your jobs.

It is not your job here to judge them or [780] their lifestyles. It is not your job to decide if you like them or not. You are here to decide if he is guilty, if he took advantage of them, if he raped, sodomized Nessa Winder.

I ask you, ladies and gentlemen, what did they try to hide from you? What did they try to hide from you? They came in here and they testified. Nessa told you she was drinking. Nessa told you that she was intoxicated. Nessa told you that she used drugs. Nessa told you that she passed out. Nessa told you that she met a man and on the first time that she met him -- not even on a date -- she went home and slept with that man and she didn't even know his last name.

Did any of you as she testified here get the feeling that she was hiding anything from you? Did she try to make herself look better than she was? Did she try to make herself any different than what she was?

She told you how she met him. She told you how she spent the weekend with him. She told you that they had a good time together. What reason did she have to suspect the difference in the man the following weekend?

[781] She told you that she was drunk that night. She told you that she passed out. She told you that she doesn't remember what happened from the time she left The Cave until the time she woke up at the defendant's house.

What was she trying to hide from you? Anything? Anything at all?

She recalls very well what happened when she woke up, and she told you clearly about that in detail, and if you recall the testimony of the doctor and also Detective Giardina, they both told you that when they spoke to Nessa Winder she did not appear to be intoxicated and she was coherent. She was able to describe what had happened to her.

What she woke up to on the morning of May 6, 1990 was a very different man from the man she was used to, and I submit to you, ladies and gentlemen, that the man that you met on the stand is the smooth man, the slick man, the charming man that Nessa Winder met the first weekend. We didn't get to see the other Ray. He didn't make an appearance in this courtroom.

She recalls what happened that morning. She woke up and she was mad, and why was she mad? Well, [782] ladies and gentlemen, we don't know but I can ask you to think about it. He had met Nessa Winder the prior weekend. She had told him that they could be friends. He seemed interested in Breda Keegan.

You heard from the defendant himself. You heard from Breda and you heard from Nessa that all of a sudden he wasn't calling to speak to Nessa anymore. He was calling to speak to Breda. He was calling to make dinner plans with Breda, not Nessa. You heard that from the defendant himself.

I submit to you, ladies and gentlemen, that what happened on that Saturday night was the defendant was angry. His plans hadn't gone as he expected. He was interested in Breda that night and Breda wasn't interested in him, and he was

angry about that. He was angry when you heard the defendant tell you that she wanted to go home, that she was agitated, that she was nervous, and that she kept saying, "I want to go home and I want to take Nessa with me." That is when he pulled the gun on her while Nessa was still sleeping.

Perhaps because she screamed, perhaps because [783] she caused a big disturbance, he let her go, and, yes, ladies and gentlemen, she didn't call the police. That's never been contested, and I told you from the beginning that was a mistake. There were a lot of mistakes that Nessa and Breda made in this case.

Just because they made mistakes doesn't mean that he is not guilty, and, so, what happened when Nessa woke up? Well, she woke up to this furious man. We don't know what he did during those three hours. We don't know if he was awake or asleep, but what we do know is something very interesting. We know that when Breda left Nessa was fully dressed, but when Nessa woke up, her clothes were off.

So, who took those clothes off and what was the defendant doing while she was sleeping? We don't know. What we do know is when she woke up he was angry. He was furious. He was talking about what happened with Breda and his landlady and she asked him can I go home.

Now, maybe you don't like the fact that she was there. Maybe you don't like the fact that she asked to go home but how did she feel about it [784] then?

She didn't remember how she got there. She didn't know where her friend was or where her friend had gone. She didn't know how she ended up with no clothes on and she's in

a room with this furious man who is angry about what happened with her friend a few hours before. Is it any wonder that she wanted to leave and he told her he's going to call a cab, but she doesn't think that he really did and then he demands sex. He becomes more violent and more furious when she says no.

What were his words to her? "You're not leaving until you make me come." And it goes from there. He's not satisfied. He forces her to have oral sex. He pulls her hair. She tells you how she pulled away. She told you how he slapped her. She told you how he took out the gun.

She tells you how she tried to run into the bathroom. She tells you how she looked out that window and talked to herself how can I get out of here, but she couldn't because the window was too high.

She told you how she ran into Freddy's room. [785] "Freddy, help me," and Freddy wouldn't help.

She tells you that when he got her back into his room, he was even more angry. "Look what you did now. You involved Freddy in this. You no good ten-cent whore." That was she told you.

Then you heard that he beat her. He beat her up pretty badly.

Now you hear Mr. Johnson tell you that these injuries, these injuries aren't consistent with one punch. They are consistent with what the defendant tells you. Well, you use your common sense, ladies and gentlemen. You decide if three punches could cause these injuries.

Imagine how he beat her. Imagine how she must have felt in that room being beaten by him. Imagine how she was terrified, how she wondered how could she ever get out of there, would she ever get out of there. Imagine how she felt when she saw him take out the gun and load it, fiddling with the bullets as she said.

Remember how she told him how she asked to call Ireland so she could say good bye to her family. Imagine how her eye must have felt at that time, all swollen.

[786] She told you it was almost shut. She couldn't see. It must have been throbbing. He still wasn't satisfied. He had to put his penis in her vagina at that time, and then anal sex. Squeezing, slapping her buttocks, and anal sex again, and after that second anal sex putting his penis into her mouth and she described it for you. She told you it was disgusting, that it tasted like shit. After that he still wasn't satisfied, put his penis back into her vagina until she decided what can I do here? I am going to pretend to have an epileptic fit. I'm going to shake. I'm going to let spit come out of my mouth. I'm going to pretend that something is wrong with me so he'll stop, but he doesn't stop because when she's better, when she pretends she's better so she can get her clothes on and get out, he rapes her the last time.

Now, ladies and gentlemen, Mr. Johnson has told you that the complainant Nessa Winder is lying, and I ask you, do you think she made up all these details, all these feelings, how she was feeling during this attack? Looking out a window wanting to jump out?

The description she gave of him putting his [787] penis into her mouth afterwards, that it was disgusting, that it tasted

like shit, can you make up those kinds of details? Do you think you make up the kind of detail of saying that you had an epileptic fit in the middle of it to get out of this? Do you think that she could fabricate this? Do you think she could make herself cry on the stand? Do you think she could control her demeanor the way she did in this courtroom?

Did it have the flavor of proof to you? Did you believe her when you heard her? That is what I want you to think about in this case. Did she look like she was having a good time up there? Did she look like she was having a blast? That this was party time for her to get up there on the stand and describe all the details of what that man did to her? Is that a good time? Exposing yourself like that? For what? To come all the way back from Ireland for what?

MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: Now, ladies and gentlemen, Mr. Johnson tells you again that it's all lies, and he comes up with the story that he says fits [788] the whole scenario here, that there was a boyfriend involved. Well, first of all – the boyfriend scenario – I ask you this. If as the defendant says the complaining witness Nessa Winder was awake the whole time in between The Cave and getting home, why did she want to go to his house if she knew her boyfriend was coming? That's my first question to you.

The second question is, you have the testimony read back. She told you that her boyfriend was not here at that time; that she told the detective that to get out of his house. So, if

there was no boyfriend here, there was no reason to make up a rape story.

Another thing, ladies and gentlemen, the boyfriend wasn't going to walk in on them. He didn't know where she was if the boyfriend was here.

So, what was she afraid of at that time? If as Mr. Johnson says she wasn't injured, there was no problem. She woke up. She could be on her way and go home and tell him, well, I had to go out shopping this morning or I stayed over a friend's house.

[789] Would she come up with this kind of story to explain being out the whole night? Does that make sense to you?

Now, if as he said there was some kind of incident and there was a beating that took place, if she wanted to go to the police, wasn't the beating enough? Why did you come up with this long involved story? For what purpose?

You hear now that she was living back in Ireland. Obviously her boyfriend is not in the picture, so you think she comes back here almost a year later for a boyfriend who doesn't exist?

MR. JOHNSON: Objection, your Honor.

The COURT: Overruled.

Excuse me. It's the jury's recollection of what the testimony was in the case and that is what controls regardless of what either attorney says on summation.

Go on.

MS. MULLANEY: Does that make any sense, ladies and gentlemen? To make up a story for a boyfriend who may or may not even exist?

I ask you to think about her physical condition when Mr. Johnson says she's making up this [790] convoluted story because if you are going to accuse a man of rape, are you going to make it as detailed as this so that there is so much to remember or are you going to say that it was a one time thing, that he put the gun to my head, put his penis in my vagina and that was it? He beat me up and I left.

Are you going to go through so much? Eight different incidents? For what purpose? Make it more confusing for yourself?

I ask you, ladies and gentlemen, you have the testimony read back. You listen to the cross-examination of Mr. Johnson. Did any of you hear any inconsistency during cross-examination of Nessa Winder about what happened between the time that she woke up and the time that she left? Not one.

You heard some inconsistencies about whether or not she remembered what happened between the time of The Cave and the time she woke up. That is not what this case is about. Keep your eye on the ball. There were no inconsistencies with Mr. Johnson's cross-examination about what happened when she woke up.

Ladies and gentlemen, think of the fact that [791] she went right to the police. She went right to the doctors. She had told them immediately what happened. Is this the kind of thing

you can think up when you are feeling like this? I mean she must have been in pain. She told you she was. She told you how her eye felt.

Do you think she could sit down and plan out and say first I am going to say that he put his penis in my mouth and then I am going to say that he kiss me and then I am going to say -- does that make sense, ladies and gentlemen?

I asked each of you during the voir dire if you could convict the defendant if you believe the complaining witness is credible beyond a reasonable doubt, and each of you assured me that you could. Some of you said that you needed more, and I submit to you that you have gotten an awful lot more in this case than just the testimony of Nessa Winder. I ask you to consider the corroboration in this case.

Is it a coincidence that she was raped and she goes right to the hospital and right to the police saying I was beaten and I was raped? Is that a coincidence? Is it a coincidence that she [792] says I was beaten and the medical records show bruises over the upper and lower extremities of her body? Detective Giardina sees the bruises on her body.

You didn't hear anything about it from the defendant about she got the bruises on the upper and lower parts of her body. You wouldn't get bruises on the upper and lower parts of the body if you just hit someone in the eye as he described.

Is it just a coincidence that she describes to you the injuries to her eye and the medical records show the injuries? The photographs show the injuries. The medical records indicate that she should return if her vision is still blurry, meaning that her vision was blurred.

Dr. Karimi described the trauma to the eye, and that both Dr. Karimi and the defendant's expert, Dr. Gilbert, say that the eye injury was recent. It was a recent trauma.

Is it just a coincidence that she tells you that the injury lasted and that on May 25th she says the photographs were taken you can still see the blood clot in her eye? Is that a coincidence?

Is it just a coincidence that she tells [793] Detective Giardina that he had a gun and that they go to his house and they execute the search warrant and isn't that a surprise? Another lie by the complaining witness? Was it a lie that he had a gun or is it corroboration again of what she told you?

Is it a coincidence, ladies and gentlemen, that Nessa Winder can take the stand and tell you how he loaded that gun and the defendant himself doesn't remember ever showing her the week before how to load the gun? Well, if he never showed her, how does she know how to load it? There are lots of guns in this world, ladies and gentlemen, and you don't put magazines in all of them. Some of them you put a bullet right into the gun itself.

How does she know how to load that gun unless she saw him do it, unless she saw him do it right before he held it to her head and threatened her?

Ladies and gentlemen, as you listen to the law as the Judge instructs you, I ask you to listen to the instruction on whether the gun was loaded at the time that the police officers found it, and I submit to you that if you listen to the law and recall how Detective Giardina told you that the [794] magazine was in the holster and the holster was right next to the gun in

close proximity, the People have proven to you that this gun was loaded.

I ask you to listen to the law and follow the law as to that. The People are not required to prove under the law that there were bullets in that gun to prove that it was loaded.

This Vitullo Kit, ladies and gentlemen, I submit to you that this also, the evidence obtained in this kit also corroborates what Nessa Winder told you, and I ask you, I implore you to please remember what she told you he told her from the beginning that this incident started. "Nessa, you're not leaving here until you make me come."

She never told you he ejaculated in her mouth. She never told you that he ejaculated in her anus, but what is very interesting, ladies and gentlemen, is the last act is penis into her vagina and where is the sperm in this rape kit? On her vaginal slide. He never ejaculated before then.

Now, there has been a lot of talk about these medical records and there has been a lot of talk about what should have been here as far as trauma is concerned.

[795] First of all, as you listen to the Judge's law I can assure you that it is not an element of rape or sodomy that there is trauma to a woman's vagina or anus. You are not going to hear that. It is not an element.

I don't have to prove there was injury to prove there was a rape or sodomy. That is the first thing.

The second thing is Nessa Winder is not a child. She is not a small child. She is not a woman who is a virgin. She was

very clear about that with you. She is a woman who is sexually active.

Ladies and gentlemen, we are alleging that the defendant raped and sodomized Nessa Winder by means of forcible compulsion. Forcible compulsion does not mean that he forced his penis into her vagina. The forcible compulsion in this case is him beating her up and holding the gun to her head and the back of her neck and telling her he would kill her.

What did she tell you after that? Well, let me ask you this, ladies and gentlemen. If you had been beaten like this, if you knew the violence [796] that that man could do to you, would you struggle or would you just lay there and pray that it's going to be over.

MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: She told you she didn't struggle when he was inside of her. She told you she felt pain when he was in her anus. Dr. Gilbert and Dr. Karimi told you that if there is no struggle, there is not always going to be trauma, and I ask you to rely on the testimony of Dr. Karimi and Dr. Gilbert.

She didn't say she struggled with him while he was inside. She told you she didn't struggle because she was afraid.

Now, Mr. Johnson may want to see internal injuries but Nessa Winder didn't want internal injuries on top of this, ladies and gentlemen. She had suffered enough.

Is it just a coincidence, ladies and gentlemen, that on the day after this incident, the defendant calls and leaves a message on the tape? The English language is kind of a funny thing, isn't it? We can be pretty specific. The message isn't, "Nessa, [797] look, I have really thought about it and I am really sorry that I hit you," and a message. It's a little more detailed than that, more interesting than that. He's considered the entire situation. It was his fault. He was a golden asshole. He's sorry and he'll never bother her again. They should live safely and peacefully.

Does that sound like an apology to a slap in the face? Mr. Johnson wants you to ignore all of this evidence that I have just gone over with you, ladies and gentlemen. He wants you to put it all aside and he wants you to find that reasonable doubt based on that defendant sitting right there.

Just because Mr. Johnson asks you to do that doesn't mean you have to. I ask you to listen to the Judge's charge on interested witnesses in this case. I ask you to consider whether the defendant is an interested witness. I ask you, who has the most to gain or lose who sits in this courtroom?

He came in here and he told you that he didn't do any of these crimes. He did two; he assaulted her and he had the gun in his house.

MR. JOHNSON: Objection, your Honor.

The COURT: Overruled.

[798] MS. MULLANEY: You heard on voir dire this is not TV and it's not Perry Mason. What did you expect him to say? Did you expect him to come in here and admit it? You don't get any extra credit for denying it, ladies and gentlemen.

I ask you to consider his demeanor on that stand. I ask you to consider that smooth slick character you saw here, the one who had an answer for everything. Cold, calculating rapist, that's what you saw, ladies and gentlemen.

You heard Mr. Johnson ask you on voir dire is a lie a lie? Is a white lie the same as a big lie and you all answered yes. Yes. If you lie once, you know, that's always a lie.

Well, who is the one witness who came into this courtroom and admitted that he has lied in the past? Not Nessa Winder. Not Breda Keegan. Only one man, the defendant in this case, Ray Agard.

I ask you to consider his character in evaluating his testimony. Consider what he admitted to you from that witness stand.

Is he a man that has respect for the law? A convicted felon? A man who admittedly has an [799]unlicensed gun hanging in his closet? Is that someone who has respect for the law or is that someone who has no problem breaking the law? Is that a man who sees himself as above the law, who can do what he wants despite the law?

I ask you to consider his truthfulness, his honesty. A man who tells you that I have lied on resumes, who says everybody beefs it up. A man who has denied that he has been convicted of a felony to get what he wants, a job, three times.

What kind of credibility does this man have? He will lie to get a job, ladies and gentlemen. What will he do in this courtroom?

A man who told Detective Giardina that he had no gun in his house. Then after that it was a toy gun. After that a real gun with no bullets. Yet the defendant takes the stand here and tells you that he never told Detective Giardina that.

Who is lying, Detective Giardina or the defendant? You decide, ladies and gentlemen.

MR. JOHNSON: Objection, your Honor.

THE COURT: All right. Overruled. Keeping in mind, of course, that it's the People's burden of proof to prove the case beyond a reasonable doubt. [800] However, you may consider all the testimony in the case as I will charge you.

MS. MULLANEY: Remember, ladies and gentlemen, that he denied that felony conviction to get a job.

Don't let his denials fool you. What kind of man is he? Five-foot-seven inches tall, 190 pounds according to his pedigree information taken from Detective Giardina. By his own admission, a highly trained martial artist.

Now, ladies and gentlemen, I asked a lot of questions about that martial artist. Some of you are probably pretty tired of me harping on that question of martial arts. What kind of man beats a woman like this? What kind of man abuses a woman the way you heard Breda and Nessa describe it? I ask you to think about what he told you and I ask you if it makes any sense.

Use your common sense here. A lot of what he told you corroborates what the complaining witnesses told you. The only thin that doesn't is the denials of the crimes. Everything else fits

perfectly. He just wants you to believe his version of what happened.

Does it make sense? He told you Breda wanted to [801] go home. Breda was reluctant to go to his house. Breda was loud. Breda was very agitated. Breda tried to get Nessa to go home.

Does this sound like a woman that nothing has happened to? Does this sound like a woman who is nervous, who is upset, who has just had a gun held to her head?

Why was she so agitated? Why was she so upset at the time? Why was there so much noise that the landlady was outside at six o'clock in the morning?

The defendant tells you everything was fine. Breda left and Nessa woke up at nine o'clock in the morning and they had sex, and he tells you everything was fine. He says they woke up again at one o'clock. Then he says they got into an argument.

Did what he said to you, ladies and gentlemen, make sense to you? Did it make any sense at all?

On his direct examination he tells you how when he turned her around he got a scratch on his lip I ask you to take a look at this photo and see if you see marks of any injury of any sort on his face.

[802] He tells you that when he turns her around -- imagine this -- she immediately is able to fit her finger into his mouth from being turned around, and scratching him inside. Does that make sense?

This is a highly trained martial artist. This is someone who by his own admission tells you that he has fought hundreds of times. This is a man who can't deflect her hand? Can't push her hand away from his mouth? This is a man who can't push her away? This is a man who can't hold her arms down?

At 190 pounds, ladies and gentlemen, and her being 108 pounds, he is almost one hundred pounds heavier than her, and yet this little woman was able to get her finger into his mouth and scratch him. Does it make any sense?

Then what about on cross-examination, all of a sudden on cross-examination it was "I forgot. I forgot. She had slapped me three times before she got her finger into my mouth."

Well, wait a second. I thought you turned her around and she had her finger in your mouth. Where did the three slaps come in here? And again, ladies and gentlemen, -

[803] MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled. It's the jury's recollection of what the testimony was that counts.

MS. MULLANEY: Three slaps? One slap, maybe. Two more slaps and he let her hand keep coming? Think about what the words were that he told you when she scratched him. In a direct response to pain, my hand shot out and I hit her.

Does this sound rehearsed? He said it twice. He said it on direct examination and he said it on cross. I ask you to think about the way that he testified.

He told you that when this woman left his house, her eye was a little red but she looked fine to me. Does that make sense? Could she have looked fine at that point? He tells you, ladies and gentlemen, that his landlady called up because of the screaming.

Now, what he described to you, ladies and gentlemen, wasn't screaming. It was a small physical altercation. Where did the screaming start? What happened? There is more to it than what he's telling you.

Use your common sense. You know, ladies and [804] gentlemen, unlike all the other witnesses in his case the defendant has a benefit and the benefit that he has, unlike all the other witnesses, is he gets to sit here and listen to the testimony of all the other witnesses before he testifies.

MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: That gives you a big advantage, doesn't it. You get to sit here and think what am I going to say and how am I going to say it? How am I going to fit it into the evidence?

MR. JOHNSON: Objection, your Honor.

THE COURT: Overruled.

MS. MULLANEY: He's a smart man. I never said he was stupid. He's not accused of being stupid and he wasn't stupid. He used everything to his advantage. He even tried to pick the right victims here. He tried to pick victims that you

wouldn't like, that he thought you wouldn't believe because of what happened and the circumstances here.

He's not stupid. He's not stupid at all. I ask you to consider how his face looked three days later. Not a mark on him.

I ask you to consider that by his own words he [805] needed the medical treatment and he told you on that stand that he was angry when Nessa left. He was angry at the way she had treated him. He didn't like what she had done. He didn't like that his landlady had called. He didn't like the altercation. He wasn't happy at all.

Yet this is the man who calls her the next day to tell her that he was sorry for what had happened? Does that make sense?

Ladies and gentlemen, you heard a lot of testimony from Breda and Nessa. You heard what the defendant did to them. You heard the situation that they got themselves into in this case. They believe that nothing bad could happen to them. They believed that the defendant wouldn't hurt them. They trusted him and they were wrong.

That is not a defense in this case. That doesn't mean that he is not guilty. Nessa Winder paid a horrible price for her mistake, didn't she?

Do you think that woman would ever forget what happened to her? Do you think she will ever be able to put out of her mind what she went through on that day? How it felt to have a gun against her head?

[806] The defendant took a lot of advantage of the position that the two complainants put themselves in. This was a crime of opportunity. She was there. He wanted sex. She didn't want it and he raped her.

He was the one in power. He was the one in control, and he was going to have what he wanted no matter what, no matter what it took.

He forced her. That man did almost as much damage to Nessa Winder in the space of four hours that he could possibly do. What more could he have done to her? He didn't treat his dog the way he treated Nessa Winder.

MR. JOHNSON: Objection.

THE COURT: Sustained.

MS. MULLANEY: He beat her. He sexually abused her. He threatened her life. He tried to break her spirit and he tried to break her will, but Nessa and Breda were the wrong victims to pick in this case because they had some strength. No matter what their lifestyle, no matter what their behavior, they were able to come in here and tell you what happened to them.

You heard the Judge tell you in the beginning [807] that you cannot decide this case on bias or prejudice, or whether you like someone or don't like someone. You have to decide this case on the evidence.

I ask all of you to give Nessa and Breda's testimony all of the credit that it is worth. Everything that it is worth. I ask you to give the defendant's denials exactly what they are worth. Exactly what they were worth when he denied his felony

conviction on his job applications. What did his denial mean then? Nothing much.

I ask you to listen to the law, to follow the law and to judge this case on the facts and the evidence, and more than anything else, to give the complainants justice and to find the defendant guilty of each and every count.

MR. JOHNSON: Objection your Honor.

THE COURT: Thank you, Ms. Mullaney.

We are going to have a brief recess before the Court's instructions on the law. The case is not over. Do not discuss it. I will see you back here very shortly.

(Thereupon, the jury withdrew from the courtroom)

[808] MR. JOHNSON: Your Honor, if I may, at this time I am going to move for a mistrial based on error and comments of the prosecution in summation.

First with the cumulative effect of prejudicial appeals to the jury's emotions and prejudice, as well as in particular twice making comments about the complaining witnesses returning from Ireland to testify at the trial. That is something that never came out in the evidence at the trial. It is an improper attempt – it's an improper attempt to bolster the complaining witnesses' credibility.

That was something I listened for at trial. It never came out. I never had the opportunity to cross-examine either of the complaining witnesses concerning accommodations made for them in their return from Ireland or in their stay here. Whether

the District Attorney made any accommodations or whether they gained any benefit such as hotel and air fare and whatever other accommodation may or may not have been made.

It is an area that I did not go into because there was never any evidence at trial that they returned from Ireland. It never came out at trial that they returned from Ireland to testify.

[809] The District Attorney twice made reference to that. It was not only not in the case but because it wasn't in the case it was a line of cross-examination that was not gone into regarding that.

The District Attorney also made reference to prayer, making an improper appeal to the jurors' emotional or religious beliefs.

MS. MULLANEY: Judge, I never said anything about prayer. I don't know what Mr. Johnson is referring to.

MR. JOHNSON: Playing it would be over, or something to that effect.

The District Attorney made a comment that Mr. Johnson wanted to see internal injuries in this case, which is a prejudicial misstatement of my position. My position was that if it had happened, there would be. To tell the jury that Mr. Johnson wanted to see internal injuries in the case is truly prejudicial and appeals to their emotions and a key shot at the defense.

She also said that Mr. Agard admitted that he assaulted the complaining witness. Assault is a legal term. Mr. Agard described what happened. He never admitted any assault.

[810] Once again, cumulative prejudicial error.

She said that he admitted having an unlicensed gun hanging in his closet. There was never any testimony at this trial regarding whether or not this gun was licensed. That is something that never came out at the trial. It's a fact that the District Attorney is now trying to prove in her summation along with the complaining witnesses returning from Ireland that never came out in the facts of this case.

Once again, attempting to prejudice the jury against Mr. Agard.

She commented on Mr. Agard's presence at the trial. He has the absolute constitutional right to be here, your Honor. It is improper to make comments to the jury that they should not believe him due to his exercise of his constitutional rights to be present at his trial.

I believe your Honor sustained the objection to the dog comment but it was an unnecessary prejudicial comment nonetheless.

For these specific and the cumulative effect, I would move for a mistrial.

THE COURT: The motion is denied. It hardly [811] reaches the standard that one would even begin to consider that, the dog.

The fact that the defendant was present and heard all the testimony is something that may fairly be commented on. That has nothing to do with his right to remain silent. That he was the last witness in the case as a matter of fact.

The reference to prayer was properly addressed by the District Attorney. It was hardly an appeal to religious feelings at all.

The comment regarding internal injuries in the manner in which it was stated I think was properly stated and the jury understood what the District Attorney was saying. Not what you personally wanted but in order for the People to prove their case, they had to show there were internal injuries. I think any fair and reasonable hearing of that would reach that conclusion.

So I think you are off base on that.

The defendant is charged with possession, knowingly and unlawfully possessed a gun. Under the circumstances your comments about the unlicensed gun are inept. Your motion is denied.

We will have a brief recess before we resume.

[812] MR. JOHNSON: I assume your Honor also is denying any error in the prosecution's twice commenting on the complainant's return from Ireland.

THE COURT: The Court will charge the jury with respect to – I have already indicated that on several occasions, at least once that I recall offhand and I will do so again during my charge – that the jury will consider only what they hear and not speculate and what their recollection of the testimony was.

As a matter of fact, both counsel took the opportunity to assume the robes in this case and improperly told the jury that they can ask for the testimony to be assured of what was said. That is a function of the Court, but I am glad under the

circumstances since you both said it and the Court will say it again, the jury will very clearly understand that their recollection of the facts in this case is what controls and not what the attorneys say on their summations.

Under the circumstances the comment to which you immediately refer is of no consequence under the circumstances. I am not satisfied that requires [813] individually or cumulatively under the circumstances a granting of your motion for a mistrial.

MR. JOHNSON: I would note my exception.

THE COURT: Thank you. We will resume in a few minutes.

(Whereupon, a brief recess was had).

VERDICT SHEET

PEOPLE OF THE STATE OF NEW YORK

V. RAY AGARD

COUNT	CHARGE	GUILTY	NOT GUILTY
1	RAPE IN THE FIRST DEGREE		X
2	RAPE IN THE FIRST DEGREE		X
3	RAPE IN THE FIRST DEGREE		X
4	SODOMY IN THE FIRST DEGREE		X
5	SODOMY IN THE FIRST DEGREE		X
6	SODOMY IN THE FIRST DEGREE		X
7	SODOMY IN THE FIRST DEGREE	X	
8	SODOMY IN THE FIRST DEGREE		X
9	SEXUAL ABUSE IN THE FIRST DEGREE		X

COUNT	CHARGE	GUILTY	NOT GUILTY
10	ASSAULT IN THE SECOND DEGREE	X	
11	UNLAWFUL IMPRISONMENT IN THE FIRST DEGREE If you find the defendant guilty of Count 11 do not consider Count 12 and go on to consider Count 13. Only if you find defendant not guilty of Count 11 may you consider Count 12.		X
12	UNLAWFUL IMPRISONMENT IN THE SECOND DEGREE		X
13	INTIMIDATING A VICTIM OR WITNESS IN THE THIRD DEGREE		X
14	MENACING		X

COUNT	CHARGE	GUILTY	NOT GUILTY
15	CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE		X
16	CRIMINAL POSSESSION OF A WEAPON IN THE SECOND DEGREE		X
17	If you have found defendant guilty of either Count 15 or Count 16, do not consider Count 17 or Count 18, and go on to consider Count 19. CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE If you find defendant guilty of Count 17, do not consider Count 18 and go on to consider Count 19. Only if you find defendant not guilty of Count 17 may you consider Count 18.	X	

COUNT	CHARGE	GUILTY	NOT GUILTY
18	CRIMINAL POSSESSION OF A WEAPON IN THE FOURTH		
19	CRIMINAL POSSESSION OF A WEAPON IN THE THIRD DEGREE	X	